DEC 1 PAGE 1

Supreme Court, U.S.
FILED
NOV 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-369

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GENERAL MOTORS CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF OF GENERAL MOTORS CORPORATION

THEODORE L. GARRETT
(Attorney of Record)

COVINGTON & BURLING
1201 Pennsylvania Ave, NW
P.O. Box 7566
Washington, D.C. 20044
(202) 662-5398

Attorney for General Motors Corporation

Of Counsel:

PATRICK J. MCCARROLL
Legal Staff
General Motors Corporation
New Center One Building
3031 West Grand Boulevard
Detroit, Michigan 48232

November 1989

BEST AVAILABLE COP

TABLE OF CONTENTS

	Page
ARGUMENT	2
I. THE CLEAN AIR ACT REQUIRES EPA TO ACT ON SIP REVISIONS WITHIN FOUR MONTHS	2
II. THE DECISION BELOW IGNORES THE POLICIES BEHIND THE FOUR-MONTH RULE	3
III. THE GOVERNMENT'S ARGUMENTS FOR DEFERRING REVIEW ARE UNPERSUASIVE AND SPECULATIVE	6
CONCLUSION	8

TABLE OF AUTHORITIES

CASES:	Page
American Cyanamid Co. v. *EPA*, 810 F.2d 493 (5th Cir. 1987)	*passim*
Construction Laborers v. *Curry*, 371 U.S. 542 (1963)	7
Cook v. *Hudson*, 429 U.S. 165 (1976)	8
Council of Commuter Organizations v. *Thomas*, 799 F.2d 879 (2d Cir. 1986)	3
Cox Broadcasting v. *Cohn*, 420 U.S. 469 (1975)	7
Duquesne Light Co. v. *EPA*, 698 F.2d 456 (D.C. Cir. 1983)	3
United States v. *Alcan Foil Products*, 694 F. Supp. 1280 (W.D. Ky. 1988), *appeal pending*	3
United States v. *Musingwear*, 340 U.S. 36 (1950)	8
United States v. *National Steel Corp.*, 767 F.2d 1176 (6th Cir. 1985)	3
STATUTES:	
42 U.S.C. § 7410(a)(2)	2
42 U.S.C. § 7410(a)(3)	2
42 U.S.C. § 7410(g)(1)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-369

GENERAL MOTORS CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF OF GENERAL MOTORS CORPORATION

The brief filed by respondent admits that there is a conflict in the circuits on the issue presented in the petition and also acknowledges that "the issue is of considerable importance." (U.S. Br. Opp. p. 14). For these reasons, this Court should grant General Motors' petition. The government's suggestion that review by this Court be deferred because further proceedings in the district court or Congress may affect the contours of this case is inappropriate, speculative, and unpersuasive. In fact, the government's stubborn refusal to admit that it has any statutory

duty to act on revised state plans within four months—a position rejected by the court below, as well as other courts—underscores the need for prompt review by this Court.

This reply brief will address the government's position on the four-month rule, the merits of the enforcement bar in *American Cyanamid Co.* v. *EPA*, 810 F.2d 493 (5th Cir. 1987), and the need for Supreme Court review of the issue at this time.

ARGUMENT

I. THE CLEAN AIR ACT REQUIRES EPA TO ACT ON SIP REVISIONS WITHIN FOUR MONTHS.

In the decision below, the First Circuit agreed with the rule adopted in three other circuits and held that EPA must approve or disapprove a SIP revision within four months. (Pet. App. 11a-12a). There is a conflict in the circuits over the enforcement consequences of EPA's violation of the four-month rule, but there can be little doubt that Congress wanted EPA to act expeditiously. Nonetheless, the government attempts to argue against the four-month rule, despite the weight of authority against EPA's position and the fact that the government has not sought review of that issue in this Court.

Section 110(a)(2) of the Act, which contains a detailed list of substantive and procedural requirements for SIP approvals, contains an explicit four-month time limit for EPA action on SIPs. 42 U.S.C. § 7410(a)(2). Section 110(a)(3) of the Act states that EPA shall act on SIP revisions in the same manner as it acts on original SIPs. 42 U.S.C. § 7410(a)(3). All of the courts that have considered the issue in detail have held that EPA must act on SIP revisions in four months, *American Cyanamid*, *supra* at 495;

Duquesne Light Co. v. *EPA*, 698 F.2d 456, 471 (D.C. Cir. 1983); *Council of Commuter Organizations* v. *Thomas*, 799 F.2d 879, 888 (2d Cir. 1986); *United States* v. *Alcan Foil Products*, 694 F. Supp. 1280 (W.D. Ky. 1988), *appeal pending*.[1] This interpretation is also supported by the language of § 110(g)(1) of the Act, 42 U.S.C. § 7410(g)(1), which requires EPA to act on certain temporary suspensions "within the required four-month period."

II. THE DECISION BELOW IGNORES THE POLICIES BEHIND THE FOUR-MONTH RULE.

The government unpersuasively argues that the *Cyanamid* holding was properly rejected by the court below. (U.S. Br. Opp. p. 11). First, the public is not harmed if EPA cannot enforce the existing standard. There was no detriment to the environment in this case—indeed, the long-term emissions from GM's Framingham plant were reduced substantially through construction of a new paint facility at a cost of $200 million. That the short-term emissions did not present a problem is shown by EPA's own actions: although the deadline elapsed in December 1985, EPA did not bring this enforcement action until August 1987, after the old paint facility was shut down. The government ignores this fact. Moreover, the public's interests in clean air are represented by the Commonwealth of

---

[1] The government cites a dictum in *United States* v. *National Steel Corp.*, 767 F.2d 1176, 1182 n.1 (6th Cir. 1985). In that case, the parties to a consent decree had agreed that defendant could apply for a SIP revision, but that such an application would not delay the requirements of the decree. (*Id.* at 1179). The four-month rule was thus immaterial. The Sixth Circuit is currently considering whether to recognize the four-month rule and the *Cyanamid* enforcement bar. *See U.S.* v. *Alcan Foil*, *supra*; U.S. Br. Opp. p. 9, n.2.

Massachusetts, which decided that giving GM an extension of time to install a new, lower-emitting paint shop was in the interest of the people of Massachusetts.

The government incorrectly argues that the alternative remedies suggested by the First Circuit ensure that the interests of the state are protected. (U.S. Br. Opp. at 11-12). GM is entitled to raise the issue of EPA's inaction directly in response to the government's suit for penalties, however, and cannot be relegated to collateral, expensive and less effective alternate remedies.[2] Moreover, the government does not address the primary rationale for the *Cyanamid* decision—the need to give EPA incentives to respect the four-month rule in order to avoid infringement on the states' right to timely consideration of SIP revisions. EPA's policy of ignoring SIP revisions results in unilateral federal regulation, contrary to the primary state role intended by Congress. Since EPA has the power to act on a SIP revision whenever it chooses, the bar on enforcement under *Cyanamid* is one that EPA can only create for itself.[3]

---

[2] A company's ability to contest a final EPA decision disapproving a SIP revision in the court of appeals does not address Agency inaction as involved in this case, nor may a circuit court action readily allow for discovery as to the existence of bias and the commingling of rulemaking and enforcement functions. Moreover, the court in *Cyanamid* properly rejected the suggestion that a company should be relegated to a mandamus action to force EPA to act. 810 F.2d at 501, n.11.

[3] For this reason, the government's arguments concerning the nature of the court's role (U.S. Br. Opp. p. 13) misses the mark. The court in *Cyanamid* was giving effect to the four-month rule in the statute and express congressional policy concerning the role of the states under the Act.

The concern that EPA delay could undermine even-handed administration of the Act is more than a "speculative possibility" in this case.[4] (U.S. Br. Opp. p. 11). EPA's final disapproval was issued on the day the government's brief was filed in the First Circuit—timing that can hardly have been a coincidence. EPA had every reason to disapprove the revision, which had become moot by EPA's inaction for all purposes except the enforcement suit that was on appeal.

The government also unpersuasively suggests that the *Cyanamid* enforcement bar may encourage industries to propose last-minute SIP revisions for the purpose of delaying EPA enforcement actions. (U.S. Br. Opp. p. 12). The government's suggestion that the states cannot be trusted to meet their obligations under the Act should be rejected out of hand. There is no reason to think that industries will apply for frivolous SIP revisions, and even less reason to think that the states will grant them. Moreover, as noted above, EPA always has the trump card: it can identify and promptly (within four months) disapprove any revisions it believes are improper. The *Cyanamid* rule merely requires EPA to respect the states' role under the Act.[5]

---

[4] Although Congress may have provided for enforcement and SIP review functions in the same agency (U.S. Br. Opp. p. 12), Congress certainly did not intend that EPA's SIP decisions be biased by improper commingling of regulatory and enforcement functions.

[5] The government erroneously suggests that GM obtained some economic advantage by waiting until shortly before the deadline to propose a compliance plan. (U.S. Br. Opp. p. 12, n.3). This argument misstates the facts. The 1981 EPA policy on which the revision was based does not contain a deadline for such SIP

III. THE GOVERNMENT'S ARGUMENTS FOR DEFERRING REVIEW ARE UNPERSUASIVE AND SPECULATIVE.

Although admitting that the decision below conflicts with the *Cyanamid* case and that "the issue is of considerable importance" (U.S. Br. Opp. p. 14), the United States urges that the issue not be reviewed "at this time." First, the government suggests that the remand to the district court may possibly clarify the interests at stake and the practical aspects of the decision below. We must respectfully disagree. The First Circuit held that EPA's failure to act in four months, as required by statute, did not bar enforcement. The Fifth Circuit in *Cyanamid* held that such an enforcement action could not proceed. The fact that a district court, under the First Circuit's new rule, could reduce the penalties as it sees fit for various reasons (including the reasonableness of EPA's delay and prejudice to GM) does not change the fact that a square conflict exists in the circuits on an important issue.

Delay of review by this Court will leave the states, GM and other companies operating under the shadow of an unlawful EPA enforcement policy. A review of the equities by the district court will do nothing to further focus on the legal issues raised by this petition. Waiting years to learn the amount of fine that may

revisions. In 1984, GM submitted a timely request under the policy to install controls on its existing paint facility. It is ironic that the government is criticizing GM for changing its approach in 1985 in order to adopt an environmentally superior strategy. It is also ironic that the government suggests that GM was seeking an economic advantage when it spent $200 million to install a new paint shop, many times more than would be required simply to install controls on its old paint facilities.

be imposed by the district court, and then requiring GM to appeal again, will entail burdensome litigation which will not serve to clarify the interests at stake. These interests center on the right of the states to have their SIP revisions considered in a timely manner, so that they may fulfill their role under the Act to develop and implement their policy choices as to the most desirable and practical means to meet air quality goals. These state interests are frustrated by EPA's refusal to recognize the four-month rule and its position that the government can ignore SIP revisions and proceed to enforce original SIPs. These state interests are adversely affected by EPA's disdain for state prerogatives—not by the size of the fine that may be imposed on GM in this case, or on other companies in other cases.[6]

The government also notes that Congress currently is considering Clean Air Act amendments. It is noteworthy that the Administration's proposed Clean Air Act bill (which parallels H.R. 3030) would not change the *Cyanamid* rule because it does not authorize EPA to enforce an existing SIP until a proposed SIP revision is approved.[7] Certainly the possibility that legislation will have a significant impact on the issue raised in this case is speculative and remote. Such a possibility thus should not have

[6] *See Cox Broadcasting* v. *Cohn*, 420 U.S. 469, 477 (1975); *Construction Laborers* v. *Curry*, 371 U.S. 542 (1963) (Supreme Court review is appropriate even where further proceedings are to come in lower courts).

[7] It is ironic that the government claims Congress may address the four-month rule (which the government denies exists) and the *Cyanamid* holding, but that these issues should not be addressed by this Court. *See* U.S. Br. Opp. pp. 9, 14.

any bearing on the need for prompt review of the important question presented in this case.[8]

CONCLUSION

For the foregoing reasons, and the reasons in GM's initial petition, a writ of *certiorari* should be granted.

Respectfully submitted,

THEODORE L. GARRETT
(Attorney of Record)

COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-5398

Attorney for General Motors Corporation

Of Counsel:

PATRICK J. MCCARROLL
Legal Staff
General Motors Corporation
New Center One Building
3031 West Grand Boulevard
Detroit, Michigan 48232

November 1989

---

[8] In the unlikely event that intervening legislation were to eliminate the issue presented here, the remedy would be to dismiss the writ or to remand for consideration of possible mootness. *United States* v. *Musingwear*, 340 U.S. 36, 39 (1950); *Cook* v. *Hudson*, 429 U.S. 165 (1976).